IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 19, 2007 Session

CREDIT GENERAL INSURANCE COMPANY, in Liquidation v. INSURANCE SERVICE GROUP, INC., ET AL.

Interlocutory Appeal from the Chancery Court for Anderson County
No. 06CH5790 William E. Lantrip, Chancellor

No. E2007-00033-COA-R3-CV - FILED JULY 31, 2007

The primary issue in this case is whether Ohio or Tennessee law should apply to resolve a contract dispute regarding arbitration between parties who have agreed that any disputes arising out of their agreement would be governed by Ohio law. After review, we conclude that the parties' choice of law must be honored. Therefore, Ohio law controls. Because Ohio law provides that on procedural matters, such as arbitration, the law of the forum governs, Tennessee law must be applied to determine whether an issue is arbitrable. Applying Tennessee law, we hold that the dispute is subject to arbitration and therefore, the trial court's judgment is affirmed.

Tenn. R. App. P. 9 Interlocutory Appeal and Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Melinda Meador, Edward C. Meade, and Matthew M. Scoggins, III; Knoxville, Tennessee, for the appellant, Credit General Insurance Company, in liquidation.

Dale R. Cantrell, Clinton, Tennessee; and James C. Gray, Jr. and Thad H. Westbrook, Columbia, South Carolina; for the appellees, Insurance Services Group, Inc.; Appalachian Underwriters, Inc.; Robert J. Arowood; William M. Arowood; and Bobbie P. Arowood.

OPINION

I. Factual and Procedural Background

In October of 1998, Credit General Insurance Company (hereinafter "Credit General"), an insurance company incorporated in Ohio and doing business in Tennessee and other states, entered into a contract designated "General Agency Agreement" (hereinafter the "Agreement") with Insurance Services Group, Inc. Under the Agreement, Insurance Services Group, Inc. served as agents/brokers in the underwriting, sale, and/or servicing of insurance policies written by Credit General and was required to pay to Credit General premiums received from clients insured under its policies, as well as pro rata unearned commissions on cancellations and refunds of its policies. Two significant provisions of the Agreement are the clause entitled "Governing Law," providing that "[t]his Agreement shall be governed as to performance, administration, and interpretation by the laws of the State of Ohio," and the clause providing that "any unresolved disputes, controversies or claims arising under, out of, or relating to this Agreement, or to the performance under or claimed breach thereof, shall be determined and settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ('AAA')."

After the execution of the Agreement, Credit General was declared to be insolvent and was placed in liquidation. In January of 2001, the Court of Common Pleas for Franklin County, Ohio, appointed the Ohio Superintendent of Insurance as liquidator to collect and administer all of Credit General's assets. In February of 2006, Credit General, in liquidation, filed suit against Insurance Services Group, Inc. and its sole shareholder, Appalachian Underwriters, Inc. (hereinafter collectively referred to as "Insurance/Appalachian") in the Chancery Court for Anderson County, Tennessee. The complaint alleged that Insurance/Appalachian had breached the Agreement by failing to refund premiums and unearned commissions due Credit General. The complaint also included claims for conversion and breach of fiduciary duty against the officers of Insurance/Appalachian - William M. Arowood, Robert J. Arowood, and Bobbie P. Arowood (hereinafter collectively referred to as "the Arowoods"). Insurance/Appalachian and the Arowoods filed a motion to require arbitration. Initially, the trial court denied this motion; however, the trial court later reconsidered and held that the case should be arbitrated because the issue of arbitration was a procedural question governed by the law of Tennessee as the forum state and that "Tennessee's strong, established law and policy in favor of arbitration and requiring enforcement of arbitration agreements" required that the case be arbitrated. Subsequently, the trial court granted Credit General's application for permission to file an interlocutory appeal and stayed arbitration pending decision of this Court. Insurance/Appalachian and the Arowoods then filed a separate appeal of the trial court's ruling staying arbitration pending our decision with regard to Credit General's interlocutory appeal. Both appeals are now before us pursuant to our order of consolidation.

II. Issues

The following three issues are presented for our review:

1) Whether the choice of law provision in the General Agency Agreement required that the trial court apply Ohio law rather than Tennessee law in determining whether this case was subject to arbitration.

2) Whether the trial court erred in holding that this case was subject to arbitration under applicable law.

3) Whether the trial court erred in staying arbitration pending our decision regarding Credit General's interlocutory appeal.

III. Analysis

A. Standard of Review

In this appeal, we review only the trial court's conclusions of law, as the facts material to the issues presented are undisputed. A trial court's conclusions of law are accorded no presumption of correctness and are reviewed *de novo*. *See* Tenn. R. App. P. 13(d); ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

B. Choice of Law - Tennessee or Ohio

The first issue we address is whether the trial court erred in applying Tennessee law rather than Ohio law in determining whether Credit General should be compelled to arbitration.

We begin our analysis by reviewing the terms of the contract between the parties which contains a provision designated "Governing Law" and states: "This Agreement shall be governed as to performance, administration, and interpretation by the laws of the State of Ohio." As a rule, Tennessee courts will honor a contractual choice of law provision, ***Goodwin Bros. Leasing, Inc. v. H & B, Inc.***, 597 S.W.2d 303, 306 (Tenn. 1980), and there is no dispute in the instant matter that the subject choice of law provision is valid and enforceable. Therefore, we must look to the law of Ohio to determine if the parties are required to arbitrate. Our analysis of Ohio law is guided by the decision of the Ohio Court of Appeals in ***Shafer v. Metro-Goldwyn-Mayer Distributing Corp.***, 172 N.E. 689 (Ohio Ct. App. 1929), which held that the issue of arbitration was a procedural remedy to be decided pursuant to the law of the forum state.

The plaintiff in ***Shafer*** was a movie distributor who had contracted to deliver movies to the defendant at a mutually agreed upon price for exhibition in the defendant's theater. As in the case now before us, the contract in ***Shafer*** provided that the parties had agreed to arbitrate disputes arising under the contract. The contract also included a choice of law provision whereby it was agreed that "The provisions of this contract relating to arbitration shall be construed according to the laws of the State of New York." Upon allegation that the defendant had breached the contract by failing to accept and pay for tendered movies despite its agreement to do so, the plaintiff took steps required under the contract to submit the dispute to arbitration, and the arbitration board made an award in

favor of the plaintiff. However, the defendant refused to comply with this award and thereafter, the plaintiff obtained judgment in Ohio state court grounded upon the award of the arbitration board. On appeal, the defendant argued that the arbitration clause was void under then applicable Ohio law. The plaintiff argued that the arbitration agreement was valid under Ohio law and that the provision of the contract requiring that the arbitration agreement be construed pursuant to New York law was controlling and enforceable.

The ***Shafer*** court determined that arbitration was a procedural remedy and therefore, questions regarding its enforceability should be decided pursuant to the law of Ohio, the forum state. In support, the Court quoted the following language:

> The lex fori, or law of the jurisdiction in which relief is sought, controls as to all matters pertaining to remedial, as distinguished from substantive, rights, and the only uncertainty which may arise concerning this rule must result from conflicting views as to what matters fall within one or the other of such classes of rights. * * * No matter what law may govern as to the validity and interpretation of a contract, the law of the forum controls as to all matters connected with procedure for its enforcement.

Shafer*, id.* at 692 (quoting 12 CORPUS JURIS [1917] 483-84, Conflict of Laws). The Court concluded that under Ohio common law at that time, the defendant had a right to revoke his contractual agreement to submit the parties' dispute to arbitration and reversed the lower court's judgment based on the award of the arbitration board.

Therefore, applying Ohio law, we are required to look to the law of Tennessee, the forum state, to resolve questions concerning the enforceability of the arbitration clause in the case at bar, based upon the Ohio court's ruling in ***Shafer*** and subsequent Ohio case law in accord with the holding that the law of the forum state applies to questions of remedial rights. *See, e.g.*, **Guider v. LCI Communications Holdings Company**, 622 N.E.2d 415, 418-20 (Ohio Ct. App. 1993) and ***Jankovsky v. Grana-Morris***, No. 2000-CA-62, 2001 WL 1018337 at *2 (Ohio App. 2 Dist. Sept. 7, 2001) ("[T]he law of the forum controls matters connected with procedures for contract enforcement, regardless of the substantive law that applies to the contract's validity and interpretation.").

We have reviewed the Tennessee cases cited by Credit General for the proposition that Ohio law should be applied to determining whether the arbitration clause is enforceable - ***Frizzell Construction Company, Inc. v. Gatlinburg****,* 9 S.W.3d 79 (Tenn. 1999); ***Vest v. Duncan-Williams***, M2003-02690-COA-R3-CV, 2004 WL 1056741 (Tenn. Ct. App. W.S., filed May 4, 2004); and ***Spann v. American Express***, No. M2004-02786-COA-R3-CV, 2006 WL 2516431 (Tenn. Ct. App. M.S., filed Aug. 30, 2006) *appl. perm. appeal denied Jan. 29, 2007*. We do not find these cases to be on point. In ***Frizzell***, the parties had agreed that the contract would be governed by Tennessee law and that all disputes arising out of, or relating to, their agreement would be submitted to

arbitration. An issue arose as to whether the contract had been fraudulently induced. The Tennessee Supreme Court ruled that the contract indicated the parties' intention to arbitrate all disputes to the extent allowed by Tennessee law. Since Tennessee law contemplates judicial resolution - not arbitration - of contract formation issues, the High Court concluded that the parties did not intend to arbitrate a contract formation issue such as fraudulent inducement and therefore, affirmed the trial court's decision not to send the case to arbitration. In ***Vest***, the plaintiffs sued Duncan-Williams, Inc. alleging that the defendant, in brokering the sale of municipal bonds, had breached its fiduciary duty, was negligent, committed fraud, and violated state securities regulations by recommending and brokering the sale of the bonds when the defendant knew or should have known of their enormous risk. The defendant filed a motion to dismiss, alleging improper venue based on an arbitration provision in the agreement between the plaintiffs and BNY Clearing Services LLC (hereinafter "BNY"). The plaintiffs had signed an account agreement with BNY, its clearing agent, providing for arbitration and the application of Wisconsin law to the contract. The defendant sought to enforce the arbitration provision of BNY's account agreement as a third party beneficiary. Applying Wisconsin law, the appellate court ruled that a third party may enforce the provisions of a contract if a contract is entered into "directly and primarily for the benefit of third parties." *Id.* at *3. Finding no such intent in the record, the court affirmed the trial court's denial of the motion to dismiss. ***Spann*** was a class action case involving a dispute between a credit and charge issuer and cardholders regarding allegedly unauthorized charges to the cardholders' accounts by entities affiliated with the issuer. The card member agreement provided that all questions about the legality, enforceability and interpretation of the agreement and the account would be governed by Utah law. The agreement also provided that there was no right or authority for any claim to be arbitrated on a class action basis. The credit and card issuer sought to compel arbitration on an individual basis. The trial court applied Utah law and ruled that the class arbitration waiver clause was unenforceable because it was unconscionable. The appellate court also applied Utah law, but reached a different conclusion as to whether the agreement was unconscionable. The case at bar, unlike the cases just mentioned, does not involve substantive issues of contract formation, such as fraudulent inducement and unconscionability, and the right of third party beneficiaries, but purely procedural issues.

In summary, the parties chose and agreed for the law of the state of Ohio to apply to their agreement. Therefore, we are required to apply Ohio law. On procedural issues, such as whether an issue will be submitted to arbitration or decided by the court, Ohio law requires us to apply the law of the forum state, which is Tennessee.

C. Arbitration

We next address the issue of whether the arbitration provision is enforceable against Credit General under Tennessee law. The Tennessee Supreme Court has acknowledged that agreements to arbitrate are favored under Tennessee law as follows:

> In general, arbitration agreements in contracts are favored in Tennessee both by statute and existing case law. The Uniform Arbitration Act [as codified at Tenn. Code Ann. § 29-5-302, et seq.]

provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract....

Tenn. Code Ann. § 29-5-302(a) (2000). As this Court has recognized,

> [a]ttitudes towards arbitration changed as time passed. This change was reflected in the courts by judicial decisions praising arbitration and in society by the passage of statutes embracing arbitration as an alternative forum for dispute resolution. The effectiveness of modern arbitration statutes has been measured in terms of their inclusion of provisions making agreements to arbitrate irrevocable and initiating a time-saving procedure for compelling arbitration.... Moreover the [Uniform Arbitration Act] embodies a legislative policy favoring enforcement of agreements to arbitrate.

Buraczynski v. Eyring, 919 S.W.2d 314, 317 (Tenn. 1996).

Benton v. Vanderbilt Univ., 137 S.W.3d 614, 617-18 (Tenn. 2004).

While agreeing that the law in Tennessee generally favors arbitration, Credit General asserts that arbitration may be denied upon grounds of "laches, estoppel, waiver, fraud, duress, and unconscionability,"citing ***Spann***, 2006 WL 251643 at *8. However, based upon review of the record, we do not find that such grounds exist. Credit General further observes that in ***Frizzell*** we held that claims for fraudulent inducement in the formation of a contract did not have to be arbitrated because under Tennessee law, claims relating to contract formation are within the exclusive province of the courts. However, the case before us does not involve a claim for fraudulent inducement in the formation of a contract. Finally, Credit General directs our attention to Tenn. Code Ann. § 56-9-313(a)(1), which provides that "[u]pon issuance of an order appointing a liquidator of a domestic insurer or of an alien insurer domiciled in this state, no action at law or equity or in arbitration shall be brought against the insurer or liquidator, whether in this state or elsewhere, nor shall any such existing actions be maintained or further presented after issuance of such order." While this statute prohibits the commencement of actions, including arbitration actions, *against* a liquidator, it has no bearing on a case such as the one now before us which was commenced *by*, not against, the

liquidator. In sum, Credit General presents no Tennessee authority that would prohibit arbitration of a breach of contract action commenced by an insurance company in liquidation, and we find no basis for refusing enforcement of the arbitration clause consistent with the intent of the contracting parties and the law of this state favoring arbitration.

D. Stay of Arbitration

The final issue presented for our review is whether the trial court erred in staying arbitration pending our decision regarding Credit General's interlocutory appeal. Insurance/Appalachian raises this issue, arguing that the trial court failed to state any legal basis for staying the ongoing arbitration in this case and that such stay was not permitted under the Tennessee Uniform Arbitration Act or under Rule 9 of the Tennessee Rules of Appellate Procedure. In consequence, Insurance/Appalachian requests that we allow the parties to continue arbitration. We conclude that this issue is now moot in light of our decision.

IV. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed and the cause is remanded for further action consistent with our opinion herein. Costs of appeal are assessed to the appellant, Credit General Insurance Company in liquidation.

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SHARON G. LEE, JUDGE